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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 432

WILLIAM E. LAMB, PETITIONER

vs.

STERLING B. CRAMER, ET AL, RESPONDENTS

STATEMENT OF FACTS AND BRIEF FOR RESPONDENTS

GERALD FITZGERALD,
Counsel for Respondents

of Counsel.
SAM C. COOK.
GARNER W. GREEN,

Clarksdale (Miss.) Printing Company

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STATEMENT OF FACTS AND BRIEF FOR RESPONDENTS

May It Please the Court:

I.

The petition for writ of certiorari herein having heretofore been granted by this court, the case comes up as does the companion case, No. 433 on the docket of this court, for hearing on the error alleged to have been committed by the Circuit Court of Appeals.

It may be stated at the outset that this cause No. 432 and cause No. 433 on the docket of this court (United States Supreme Court) involve exact-

ly the same subject matter and parties, but different questions of law. This case No. 432 originated in supplemental proceeding in equity in cause No. 129 of the District Court of the United States in an effort to cause the restoration to the hands of the court of part of the subject matter in litigation. Cause No. 433 was an ancillary proceeding instituted in the same court for the same purpose about the same subject matter but instituted as a separate cause by the receiver, instead of joining the complainants in the supplemental proceedings in cause No. 129. The receiver having been appointed in the meantime between the date of the filing of the supplemental petition in cause No. 129 below (No. 432 here) and the date of the filing of the ancillary proceeding known as No. 162 below (No. 433 here). The causes should be argued together and heard by this court at the same time.

II.

Statement of Facts

In an equity case (No. 129) pending in the district court of the United States, wherein was sought to be set aside certain fraudulent conveyances, and wherein a lien, both by statutes of the state and rules of decision was claimed, and finally imposed, by decree therein on said property involved in said suit, a supplemental petition was filed April 21, 1930 (R. Pages 122-127) as against petitioner here, and others, alleging the transfer pendente lite, to petitioner, of a part of the subject matter of the litigation therein; and alleging that petitioner and others (a) were in contempt of court for such

transfers (R. Page 125); (b) that they should be made to account for the funds (R. Page 126) and that such transfers should be set aside and full relief given to the plaintiffs. On the said supplemental petition an order was entered on April 21, 1930 (R. Pages 128-130) in the original equity suit No. 129 making petitioner and others parties defendant to the suit (R. Page 130) for all purposes and especially (a) for setting aside such conveyances, and (b) to show cause why petitioner and others should not be held in contempt.

Service of a copy of the order was required therein and made on petitioner April 21, 1930 (R. Pages 128-31). Thereupon on April 22, 1930, an order was entered by *consent* enjoining further transfers by the defendant, or her *attorneys*, (one of whom was petitioner) (R. Page 127). A final decree was then entered in the main proceeding April 30, 1930 (R. Page 127-146) settling and determining the main controversy but reserving the supplemental petition and other matters for hearing (R. Page 134. Also Record Page 138, Paragraph XVI). The injunction as against further transfers by defendant or her attorneys (petitioner) was made perpetual (R. Page 138) and since hearing was reserved on the supplemental proceeding, it was provided in the decree,

> "Wm. E. Lamb, or Butler, Lamb, Foster & Pope not to be prejudiced hereby" (R. Page 146).

At the same time and on the same date as of the entry of the decree, April 30, 1931, the hearing

on the supplemental petition was by consent set for June 9, 1930 (R. Page 146) at Biloxi, Mississippi. Thereupon, petitioner on May 19, 1930 (R. Pages 147-172) filed in the district court in cause No. 129 a full and complete answer to the charges made against him in the supplemental petition, and treated the supplementary petition as (a) petition to set aside fraudulent conveyances, and (b) order to show cause as for contempt, answering both phases (R. Page 167) and praying complete exoneration. The said answer was filed by petitioner personally.

The supplementary petition and answer (for reasons not mentioned in the record) did not come on for hearing at Biloxi, Mississippi, on June 9, 1930, but in the meantime on April 30, 1930, the auxiliary or ancillary bill in cause No. 162 was filed.

At a later date, more than two months after filing his answer, to-wit, on July 22, 1930, the petitioner

> "*Appeared specially* for the sole purpose of moving the court to quash the citation aforesaid, and to dismiss the petition aforesaid, and for no other purpose on the ground that the court was, and is without jurisdiction (R. 173-175).

In spite of the general appearance of the petitioner and his plea for exonoration and general relief (R. Pages 147-172) the district court, in cham-

bers, heard the "Motion to Quash the Citation" and by decree (R. Pages 175-177) without evidence of any kind before it, and only on the motion to quash, ordered (R. Page 176):

> "That the said motion of the said Wm. E. Lamb to quash the process and dismiss the petition for the citation of Wm. E. Lamb for contempt, and for an order to turn over money paid him by the defendant, be and the same is hereby sustained, and the rule to show cause is hereby discharged, and the said petition is hereby dismissed, without prejudice to the rights of the plaintiffs, the receiver, or any interested party, to proceed civilly in the matter as they or any of them may be advised; and the said Wm. E. Lamb is dismissed hence without day, and all costs of this proceeding to be taxed by the Clerk are taxed upon the plaintiffs herein, judgment for said costs when so taxed is hereby entered against plaintiffs, for which let execution issue as at law."

The said quashal being made on the sole ground that petitioner, a non-resident attorney attending court in a foreign jurisdiction was privileged from service. See objections to the incorporation in the transcript of the record on appeal to certain portions of the record. (R. Page 192) where the attorneys for the respondents presented to the judge of the lower court said objections, and it was therein stated that the sole question on appeal as presented to the Circuit Court of Appeals, and as presented to the

Honorable E. R. Holmes, judge of the lower court was and is:

> "Was Wm. E. Lamb, at the time of the service of the writ upon him in this cause, a non-resident attorney attending court in a foreign jurisdiction and hence not subject to the service of subpoena, or other writ in the District Court of the United States for the Delta Division of the Northern District of Mississippi?"

This was passed on by the court by order excluding from the record certain matters sought to be included by the praecipe of petitioner here, appellee there. (See order of the court R. Pages 194-196, inclusive).

Plaintiffs in the district court then appealed the case to the Circuit Court of Appeals for the Fifth Circuit where the case appeared as No. 6004. The errors assigned on appeal were to the effect that the court erred in dismissing the petition and citation as against Lamb because the proceedings were supplementary in cause No. 129 and the order of court and copy of the petition served on Lamb and his answer thereto were sufficient to give the court jurisdiction for the purpose of hearing the merits and restoring the subject matter of the litigation if justice demanded. The errors assigned appear at R. Pages 179-180. In the Circuit Court of Appeals the petitioner here moved to dismiss the appeal because (a) the order appealed from was a judgment in criminal contempt in favor of appellee; (b) was an order entered in a civil case which was not final,

and, therefore, not appealable. The case was heard by the Circuit Court of Appeals on the motion to dismiss and on the merits at the same time. Thereupon the Circuit Court of Appeals reversed the lower court. Judge Dawkins' opinion for the Circuit Court of Appeals appears at R. Pages 207-209, and decree of the Circuit Court of Appeals at R. Page 209. By reference to the opinion of Judge Dawkins (R. Pages 207-209) it will be seen that the Circuit Court of Appeals ruled squarely on the assignment of errors presented by the appellant, viz: that the ancillary petition and order served on him of a copy of said order, and his answer seeking exoneration were sufficient to give the district court jurisdiction of petitioner and to inquire into the equities in cause No. 129, and that the district court should not have dismissed the petition and quashed the citation as well as dismissed without day, the petitioner on the "Motion to Quash the Citation."

ARGUMENT

In the Circuit Court of Appeals the petitioner contended that his "Motion to Quash the Citation" (R. Pages 173-175) was a motion to dismiss, under *Equity Rule Twenty-nine*, which supplants a demurrer and not a motion to "Quash the *Service* of Citation." But whether the said motion to quash the citation be taken as a motion to quash the citation or a motion to quash the *service* of citation it can make no difference in the error of the district court in dismissing the petitioner without day. His appearance in the court (1) by allowing the restraining order (R. Page 127) to be entered by consent

against the defendant and petitioner as her attorney; (2) the entry in the decree in the original cause, to which he was then a party, of the reservation, "Wm. E. Lamb, or Butler, Lamb, Foster & Pope not to be prejudiced hereby" (R. Page 146); (3) his answer seeking complete exoneration (R. Page 147-172); (4) his agreement in person to continue the hearing on the citation to June 9, 1930 (R. Pages 146-147) were sufficient to enter his general appearance in the original cause in equity, No. 129. The filing by him thereafter of his "Motion to Quash the Citation" whether it be considered in the nature of a demurrer or otherwise, could not justify the district court in dismissing him entirely from the case in view of the charges contained in the supplementary petition.

Since we have not received any brief on the merits in this cause we must refer to the errors alleged to have been committed in the Circuit Court of Appeals as set forth in the petition for the writ. In the brief in support of the petition for writ of certiorari Paragraph IV, Page 8, counsel for the petitioner states:

> "The errors intended to be urged are those specified under heading B in the petition and for the sake of brevity will not be repeated."

Turning to heading B in the "Petition for the Writ of Certiorari and Brief in Support Thereof" Page 4, we find five errors alleged under the heading "Reasons Relied Upon for the Allowance of the Writ." For the sake of brevity we will not repeat in full the errors but summarize them as follows:

1. The Circuit Court of Appeals had no jurisdiction of the appeals because the judgment appealed from was a judgment for the defendant in a criminal contempt case.

2. The Circuit Court of Appeals erred in treating the decree of the district court as an order which merely quashed *service* of the citation.

3. The Circuit Court of Appeals had no jurisdiction because no appeal was taken from the final decree in the main proceedings.

4. The Circuit Court of Appeals erred in taking jurisdiction of the Appeal.

5. The Circuit Court of Appeals erred in reversing the judgment appealed from.

The errors above alleged Nos. 4 and 5 we have repeated in full as alleged by the petitioner in his petition, but since they are not specifications of error specific enough to challenge the attention of either court or counsel we take it that the only real errors urged in good faith to have been committed by the Circuit Court of Appeals are those numbered 1, 2 and 3.

We shall, therefore, in our legal argument take up the argument of errors alleged in specifications Nos. 1, 2 and 3 above in the order in which they are set forth and then proceed therein to the citation of legal authorities sustaining generally the decree of the Circuit Court of Appeals reversing the district court.

proceedings are void because it is an effort to join a criminal contempt proceeding with a civil supplementary proceeding seeking the restoration of subject matter of litigation, and void for the reason of said misjoinder.

Counsel for the respondent have taken the position in the courts below, and now take the position (1) that the supplementary proceedings in cause No. 129 below while they charge contemptuous conduct were really supplementary proceedings to compel restoration of the subject matter in litigation, and (2) that the appearance in the manner and form as stated of the petitioner in the cause in which he was already an attorney so fixed his status therein as that the district court erred in dismissing *him* entirely on his "Motion to Quash the Citation." That if the district court had thought that the petitioner was either not guilty of contempt of the court, or that the court had no power or jurisdiction to punish him for contemptuous conduct, that, nevertheless, it should not have dismissed him entirely from the case but should have retained him on his answer to the supplementary proceedings.

Counsel for the petitioner has insisted and now insists that the supplementary petition in this cause is purely and simply a criminal contempt proceeding and for that reason final and not appealable from the decree of the district court dismissing the petitioner. But if mistaken in that he says the whole

LEGAL ARGUMENT AND CITATION OF AUTHORITIES

I.

The Decree of the District Court Appealed from was not Rendered in a Criminal Contempt Case.

In order to show that the decree of the district court which was appealed to the Circuit Court of Appeals was appealed from a decree in a criminal contempt case, counsel cites the following cases: (Petition for writ of certiorari and brief in support thereof, Page 5)

Bessette v. W. B. Conkey, 194 U. S. 324

Matter of Christensen Engineering Co. 194 U. S. 458

Gompers v. Bucks Stove and Range Co. 221 U. S. 418, 441-4, 448.

The *Bessette v. Conkey* case, *supra,* is not in any way in point, because (1) the case was plainly one in criminal contempt in which the defendant Bessette was found guilty and sentenced to pay a fine; (2) because Bessette had not been made a party to the original cause; (3) the proceedings were independent and separate from the original suit. None of these facts apply to the instant case, nor does any statement of the law made therein contravene the law as stated in the decision of the Circuit Court of Appeals in the instant case.

In the *Christensen Engineering Co.* case, *supra,* the court said:

> "In the present case, however, the fine payable to the United States was clearly punitive, and in vindication of the authority of the court, and we think as such it dominates the proceedings and fixes its character."

It will be noticed in the Christensen case that there were two aspects to the proceedings, one criminal, the other civil and no error was alleged to have been committed on that ground.

The *Gompers* case *supra*, was a case in which criminal contempt was not charged in the petition but imposed by the court and was appealed at the instance of the convicted defendant. Again it appears that this court, through Justice Lamar, recognizes that an ancillary petition may partake both of the nature of criminal and civil contempt and the court holds that (See Page 449, 221 U. S.):

> "On the other hand, if it had prayed that the court impose a fine payable to the Bucks Stove and Range Company, the language would have left no doubt that remedial punishment was sought. It is not different, in principle, if instead of praying specifically for a fine payable to itself, it asks generally for 'such relief as the nature of its case may require'. In either event such a prayer was appropriate to a civil proceeding, and *under it the court could have granted that form of relief to which the petitioner was entitled.*"

The petition in the instant case (R. Pages 122-126) while it alleged that the petitioner was guilty of contumacious conduct only prayed as follows:

"Therefore, and for the further purpose if the same shall appear necessary of cancelling and setting aside the various alleged covenous, fraudulent and nefarious transfers aforesaid, that this Honorable Court, for the purpose of carrying out and effectuating such decrees as this Honorable Court may render in the main cause herein, that each, all and every of above mentioned parties, and other parties who may appear to be concerned in the said transfer, be made parties to this cause, by proper process returnable as required by law, and that upon final hearing hereof your Honor grant to the plaintiffs full and complete general relief herein as to equity may seem meet, but that in the meantime your Honor may issue herein such temporary restraining order as may appear necessary to prevent the further transfer by gift, or otherwise, of the corpus of the estate herein sued for, and that such temporary restraining order be supplemented by writs of injunction to be granted hereinafter, permanently and wholly restraining and enjoining all persons from further transferring and disposing of the property sued for, and/or involved in this litigation." (R. Page 126).

Justice Lamar in the *Gompers v. Bucks Stove & Range Co.* case, *supra*, while distinguishing the differences between civil and criminal contempt, says at *Page 448* of *221 U. S.*:

"Bearing these distinctions in mind, the prayer of the petition is *significant* and *determinative.*"

Counsel for the respondent has caused the brief of associate counsel, Mr. Cook, in the Circuit Court of Appeals, to be printed in the record (Pages 199-206) on the ground, we suppose, that it was stated in the brief by Mr. Cook:

> "It would avail us nothing to enter into a moot debate with counsel as to the propriety of that proceeding in as much as there is no error assigned by the appellant upon the action of the court below in dismissing the contempt charge."

Certainly the brief of one counsel in the Circuit Court of Appeals unless taken in connection with all the other briefs could not be determinative of the issues involved here. We think, however, that associate counsel meant by this assertion that the matter of criminal contempt as against the petitioner was not intended to be urged either in the district court or in the Circuit Court of Appeals, but that the sole matter in issue was the question of restoration to the court of the subject matter of the litigation.

Upon the filing of the pleadings quoted from above the court entered an order (R. Pages 128-131) whereby the appellee was formally made a party to the suit in the court below which provided that the parties should appear before the court:

> "And show cause why they should not be adjudged to be in contempt of this court, and further they they should show cause why they should not be adjudged to hold all of the property under the control of the court, and that said transfers be set aside." (R. Pages 129-130).

To the service of the above citation (Being copy of the decree served on him) the petitioner answered fully seeking exoneration. (R. Page 147). Also after the service upon him of the copy of the said decree the petitioner, while having been made a party by the said decree, agreed in open court to the entry of the restraining order (R. Page 127). Said restraining order was made perpetual by decree (R. Page 138) and hearing of petition reserved (R. Page 138, Par. XVI. Also R. 134) and further agreed in open court to the entry of the order (R. Pages 146-147) continuing the hearing on the citation until June 9, 1930, at Biloxi, Mississippi. It was only an afterthought that the "Motion to Quash the Citation" was filed more than two months later, and hearing on that alone set and heard by the court.

In view of the fact that petitioner was present in the court when the final decree in the original cause was entered , (R. Pages 131-146, inclusive) and at his request, through the courtesy of counsel, the following was entered in the original decree:

> "Wm. E. Lamb, or Butler, Lamb, Foster & Pope not to be prejudiced hereby."

we insist that he recognized that he was a party to the cause.

Reviewing the above pleadings and the actions of the parties therein we do not see that it can be successfully contended that this case was one alone for contempt, or that it partook of the nature of criminal contempt.

Counsel cites three cases on the proposition that the Circuit Court of Appeals had no jurisdic-

tion to reverse the judgment in this case (Petition for Writ of Certiorari and Brief in Support Thereof, Page 5) to-wit:

United States v. Bittner, 11 Fed. (2) 59

Wingert v. Kieffer, 29 Fed. (2d) 59

United States v. Sanges, 144 U. S. 310.

We have referred to each of these cases and find that they are each and all cases of an appeal in a criminal contempt case and have nothing in common with the instant case.

In the *Bittner* case, *supra*, 11 Fed. (2) 95, the court said:

> "In these cases the writs of error were sued out on a judgment in a criminal contempt proceeding."

In the *Wingert* case, *supra*, 29 Fed. (2) 60 in summing up the case, the court said:

> "It was, therefore, a proceeding in criminal contempt."

In the *Sanges* case, *supra*, 144 U. S. 310 the United states sought an appeal from a decision of the district court sustaining a demurrer quashing an indictment.

We respectfully submit, with due deference, that none of the cases cited have any application to the instant case. In no sense of the word can it be said that the appeal to the Circuit Court of Appeals was an appeal from a decision of the district court in a criminal contempt charge.

II.

Joining Allegations of Contemptuous Conduct with Prayer for Civil Relief Does Not Invalidate Whole Supplemental Proceedings.

Counsel for the petitioner, before the Circuit Court of Appeals, took the position that the fact that the petition in the lower court (R. Pages 122-127, inclusive) accuses the petitioner of contemptuous conduct towards the court, and in the same petition requests that the transfers made to him pendente lite be canceled and set aside, was a complete misjoinder of causes and rendered the whole proceeding void.

We have not regarded the supplemental petition, nor the citation issued thereon in any respect in the nature of a criminal contempt, especially as against the petitioner, and we refer the court to that petition (R. Pages 122-126, inclusive). The preamble of the petition (R. Page 122) states that the defendant Florence T. Holland and her agent, W. P. Holland:

> "Have during the pendency of this litigation and utterly disregarding the rights and privileges of the plaintiffs, and the equities in this cause, and the dignity, power, and authority of this honorable court, and in contumacious and contemptuous disregard thereof, have, in order to further hinder and delay the creditors of said W. P. Holland done the following acts."

The petitioner Wm. E. Lamb was not mentioned there in the preamble, nor is his name mentioned until in Paragraph 4 (R. Page 124) it is alleged that the Hollands, conspiring with Lamb, had paid to him

approximately $90,000.00 of the subject matter of the litigation. (R. Page 125). The prayer of the petition (R. Page 126) did not contemplate the conviction of the petitioner of a criminal contempt, but did contemplate the issuing of an order to show cause why the equities should not be preserved and why he should not be held in contempt of the court for his actions in the premises. If it be taken that the charge of contempt was a criminal one in spite of the careful distinction made by Justice Lamar in the *Gompers v. Buck Stove & Range Company* case, we still say that the joining of the two would not render the whole proceedings void, and if the district court had considered that the proceedings smacked of a criminal contempt, he was still in error in quashing the entire proceedings and dismissing the petitioner without day, but with his costs.

Under the heading "Criminal and Civil Contempt" Mr. Rose in his Federal Jurisdiction and Procedure, says:

> "In point of fact, however, that of which complaint is made may have a double aspect, one civil, the other criminal. The individual complained of may have done something which has been expressly or impliedly forbidden and that which he has done may have caused pecuniary injury to a party to the cause. He had made himself criminally liable to the public and civilly answerable to the one hurt. Proceedings may be taken against him for either or for both, and if the latter be the course actually adopted, he may be punished for a criminal contempt and com-

pelled to make pecuniary redress to the one injured, for the same act in its civil aspect. Where the prosecution may in form have been for the criminal contempt, and while the punishment inflicted upon him may have been in whole or in part called a fine, the latter may be awarded altogether to the party or parties injured, or to the United States, or apportioned between, or among them as the Court may think just."

Rose's Federal Jurisdiction & Procedure
Section 31, Page 39, Third Edition
Section 35. Ibid.
Lienker v. Dillard, 275 Fed. 460

Justice Lamar, in the *Gompers* case, *supra*, at Pages 441-451 of *221 U. S.* goes carefully into the distinction between civil and criminal contempt, recognizes the close analogy between the two, holds that the prayer in the petition is determinative, and reverses the case (1) because a criminal sentence of from six to twelve months had been passed upon the defendants, respectively, on a petition in a civil proceeding and a citation issued thereon; and (2) he did not consider the matter in its civil aspect because as stated by him the Supreme Court of the United States was informed that the civil matters had been entirely settled to the satisfaction of all parties.

The only case cited in the Circuit Court of Appeals by counsel for the petitioner as an authority that civil and criminal proceedings could not be joined in the same petition, or citation thereon, was the following case:

In Re: Childs, 89 U. S. 157

Upon an examination of that case it is found that the case originated in the Supreme Court of the United States under the style, *Texas v. White, 7 Wall 700.* Chief Justice Chase delivered the opinion of the court and the decree of the court is found at the end of the case, *Page 742* et seq of *7 Wall.* In the decree it is provided:

> "And it is further ordered, adjudged, and decreed, that the complainants, or the defendants, respectively, be at liberty to apply to the court at the foot of this decree for further directions in respect to the execution of the same, if they shall be so advised."

A good many years thereafter it appears that John Childs, who was a party to the said cause of *Texas v. White* wrote certain letters to English bankers notifying them that he still claimed to be the owner of certain of the Texas Indemnity Bonds decreed by the court to belong to the State of Texas. Conceiving that this was a violation of the injunction expressed in the decree the State of Texas filed a petition with the Supreme Court of the United States in the original cause charging violation of the injunction. The petition is not set out in the opinion, but it appears that the petition requested that the said Childs be cited for contempt and punished and also asked, that he might be ordered by a proper instrument in writing to convey and transfer to the State of Texas all right, title, and interest which he appeared or pretended to have in said bonds, and counsel in the oral argument before the Supreme

Court stated that Mr. Childs should be imprisoned for contempt until he complied with the order.

The Supreme Court, through Justice Miller, answered this contention that no such order or decree had been made (ordering Childs to transfer said bonds) and that, therefore, Childs could not be guilty of contempt until the order had been made. The defendant Childs was fined $250.00 and costs of the proceedings. Justice Miller did not make the order commanding Childs to transfer by proper instrument in writing any right, or title, or interest which he pretended to have in said bonds, but said:

> "It is true that the original decree contains a provision for further direction in the enforcement of it, and it may be that such an order as is asked for now would be made on proper application and proper notice to the parties concerned. but such a proceeding can constitute no part of a proceeding for contempt in disregarding an existing order of the court. The granting or refusal of such an order is governed by very different considerations and is to be brought to the attention of the court by very different proceedings than such as belongs to the one now before us."

Not by any means holding thereby that the proceedings were void in any way, but holding that the proceedings appeared to be a criminal proceeding for the violation of an existing order of the court, for which the defendant was fined $250.00 and costs, and that the proceeding to compel the transfer of the property should, under the circumstances, be brought

to the attention of the court by another proceeding. This was proper, of course, since the case was long closed and this was a reopening thereof and it does not appear what answer, if any, Childs made to the supplementary petition or citation.

We insist there was no criminal contempt proceedings in the instant case, but the following cases demonstrate that such a joinder does not, by any means, invalidate the whole proceedings:

> "The contempt proceedings, filed in the equity case, were entitled as of that case, and, while they asked for punitive as well as remedial relief, the proceedings were treated by counsel for the respective parties and by the court as only asking for remedial relief. In other words, the allegations and prayer for punitive relief were disregarded and treated as surplusage. And the court, in its final decree, awarded nothing in the way of a penalty, but only by way of remedial relief. The contempt proceedings, therefore, are to be regarded and treated as proceedings in civil contempt, for such was the mutual understanding of the parties throughout the trial. Kreplik v. Couch Patents Co. (C. C. A.) 190 F. 565; Mitchell v. Dexter (C. C. A.) 244 F. 926."

Krentler-Arnold Co. v. Leman, 50 Fed. (2) 699

> "For the reason stated in cause No. 6072 this day decided, we think the funds were in the constructive possession of the court to the knowledge of Lamb and his client, and that plaintiffs

were at liberty to proceed by bill in equity, or by rule for contempt, or by both means, to compel their restoration to the custody of the court's officers."

Cramer v. Lamb, 48 Fed. (2) 537

In the case of

Kreplik v. Couch Patents Company, (C. C. A.) 190 Fed. 565 the exact question with regard to the joinder of proceedings for general relief and criminal contempt is discussed and passed upon by the Circuit Court of Appeals of the 1st Circuit.

It is not for a moment contemplated that we agree with counsel that there is in this case the joinder of any criminal contempt with a request for civil relief. On the contrary we think the pleadings, and the attitude of counsel and the court, show criminal contempt was never contemplated in the action.

III.

No Appeal was Necessasry from Final Decree in Main Proceedings in Cause No. 129. The Decree of the District Court in the Supplemental Proceedings was a Final Decree and Appealable.

Under Specifications of Error No. 3, Page 5 of the Petition for Writ of Certiorari and Brief in Support thereof, it is alleged that the Circuit Court of Appeals had no jurisdiction to reverse the district court because no appeal was taken from the final decree in the case. It is alleged on Page 12 thereof:

"In this case the principal case was terminated by consent decree after the contempt proceeding was instituted. That consent decree expressly provided that it should be without prejudice to petitioner and no appeal was taken from it."

In the first place we take issue with counsel and state the facts to be, as shown by the record:

The supplementary petition was filed before the final decree, to-wit: On April 21, 1930, (R. Page 129) the final decree being entered on April 30, 1930. (R. Page 146). On the same day of the entry of the final decree and after its entry the petitioner appeared in person and by agreement set the hearing of the citation and the petition for June 9, 1930, at Biloxi, Mississippi. (R. Pages 146-7). In addition the decree itself provided for the contingency of the hearing of the matter of the liability of the petitioner in the following portions thereof, to-wit:

"The court hereby reserves to itself full jurisdiction of this cause to make such other and further orders as it may deem proper and as equity may require, both as to increasing the amount of the estate, and/or increasing the amount due and owing to any party plaintiff, and/or uncovering additional property and disposing of any adverse claims that may be interposed as against any portion of said estate." (Record Page 134).

And again:

"This court reserves full jurisdiction of the causes to make any other and further orders

which may be found from time to time essential for the creation, preservation and/or disposition of the relative rights of the several parties hereto, or any claimants of any portion of the estate now or hereafter created." (R. Page 138).

Then and there in open court, and recognizing that he was a party to that cause at that time, petitioner caused to be entered in the decree the further provision:

"Wm. E. Lamb, or Butler, Lamb, Foster & Pope not to be prejudiced hereby," (R. Page 134.)

That the petitioner should afterwards, upon the employment of other counsel, file a motion to quash the citation setting up that the case had been fully and finally settled is indeed strange under the circumstances. In view of the above situation it will be seen by the court that this supplementary proceeding is separate and apart from the main proceeding and to be heard by itself alone. There are only the complainants and the petitioner here interested in the result. Certainly counsel for the petitioner would not have this court believe that he seriously contends that in a supplementary proceeding to effectuate a final decree already rendered, where the defendant to the supplementary proceeding has been discharged, the petition dismissed, and the writ quashed, that no appeal will lie unless the complainants desire to appeal from the final decree in the original cause with which they are perfectly satisfied and upon which the supplementary proceeding is brought to

enforce and to add to the estate. Such a contention is so wholly without merit that we are tempted to disregard it entirely but out of deference will refer to the cases cited by counsel for the petitioner and demonstrate their inapplicability.

Counsel cites as authority for lack of jurisdiction of the Circuit Court of Appeals of the appeal from the district court because (a) of the settlement of the case, and (b) the interlocutory nature of the decree, the following cases:

Gompers v. Bucks Stove & Range Co.
221 U. S. 418

Doyle v. London Guaranty Co.
204 U. S. 599

Matter of Christensen Engineering Co.
194 U. S. 458

Hultberg v. Anderson, 214 Fed. 349

Clay v. Waters, 178 Fed. 385

By reference to the *Gompers* case, *221 U. S. 418*, it will be seen that (1) the decree in the lower court is not set out and does not show whether the court reserved to itself the powers as in the instant decree or not, and (2) it was admitted in open court by all the parties that the civil matters had been settled finally and fully.

In the case of *Doyle v. London, etc. Co. 204 U. S. 599* the defendants were, by rule to show cause, ordered during the progress of the case, to produce certain books and papers, and for failure so to do, were

ordered to pay a fine of $250.00 and costs, or to suffer imprisonment in jail for sixty days. A writ of error was taken to the Circuit Court of Appeals and the question certified from there to the Supreme Court of the United States as to whether or not the Circuit Court of Appeals had jurisdiction to review the judgment of the district court. This court answered the question in the negative, because the judgment of contempt having been made in the progress of a civil case and the case not having reached a final conclusion, appeal did not lie, since the judgment in contempt was interlocutory. We shall not enter into an argument here with reference to the various decisions of the Supreme Court of the United States holding that a judgment in contempt proceedings of the nature set forth in the *Doyle* case is interlocutory because it is said that the person condemned "carries the keys of the jail in his own pocket" in that at any time he obeys the order of the court he is released. Suffice it to say that although the decree in the *Doyle* case is interlocutory there is no similarity either of facts or of law to the case at bar.

The *Christensen Engineering Company* case. *194 U. S. 458* was decided on an entirely different principle. The court held in that case that the proceedings were criminal proceedings "in vindication of the authority of the court, and dominated the proceedings", and held that the Circuit Court of Appeals should have taken jurisdiction of the appeal.

The Hutlberg-Anderson case, *214 Fed. 349* was an appeal by Hultberg, complainant in a creditors bill, from a decision of the district court rendered in the progress of the hearing where a master, or exam-

iner, certified to the district court the refusal of a witness to answer certain questions. The district court entered a rule to show cause against the witness. The witness still refused to answer on the grounds (a) that of privilege as attorney, and (b) immateriality of the questions. A hearing was had before the district judge and the recalcitrant witness was discharged at the cost of petitioner. The petitioner took an appeal to the Circuit Court of Appeals which was dismissed because the order entered was interlocutory, the case not having come to a final conclusion.

The *Hultberg* case is not in point for the reason that (a) the contempt proceedings were criminal, and (b) entered during the progress of a case but not quashing any writ or dismissing any defendant to a civil controversy which sought to enforce a decree.

The Clay v. Waters case, *178 Fed. 385* also is not in point because (a) a criminal contempt was involved, and (b) there was no dismissal of any defendant personally from civil proceedings and (c) was reviewed by the Circuit Court of Appeals.

That this case as appealed to the Circuit Court of Appeals was a final decision of the district court dismissing Wm. E. Lamb without day is evidenced from the following decisions:

Goldey v. Morning News, 156 U. S. 518

Conley v. Mathieson 190 U. S. 406

Shaeffer v. Carter, 252 U. S. 37

The Pesaro, 255 U. S. 216

Wilson v. Rep. Iron & Steel Co. 257 U. S. 92

Rosenberg Bros. v. Curtis Brown Co. 260 U. S. 516

United States v. Robertson, 265 U. S. 176

As said by this court in the case of

Root v. Woolworth, 150 U. S. 401

> "A supplemental bill may also be filed as well after as before a decree, and the bill, if after the decree, may be either in aid of the decree that it may be fully carried into execution, or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or by the defense made to it, or to bring forward parties before the court, or it may be used to impeach the decree.

Such a bill may be brought by or against any person claiming as assignee of a party to the decree.

Story's Equitable Pleading, Section 343, 10th Edition, Chapter 8.

Final decree having been entered in this cause reserving to the district court the jurisdiction as stated hereinbefore, there was nothing left to appeal from on a final decree but only the supplemental matter in aid of the final decree which had been especially reserved for decision, to-wit: the possession in the petitioner of a part of the subject matter of the litigation, and since he was *personally* dismissed by the court with his costs and *without day* and the supplemental petition against him dismissed as well as the citation

quashed, there was nothing left except an appeal to the Circuit Court of Appeals.

> "An adjudication, final in its nature, of matters distinct from the general subject of the litigation, such as a claim to property, is treated as final and subject to review without regard to the termination or not of the litigation in the main cause."
>
> *Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207*
>
> *Williams v. Morgan, 111 U. S. 684*
>
> *Collins v. Miller, 252 U. S. 371*
>
> *International Imp. Fund v. Greenough, 105 U. S. 527*
>
> *Collins v. Miller, 252 U. S. 366*
>
> *Arnold v. U. S. 263 U. S. 427*
>
> *U. S. v. River Range Imp. Co. 269 U. S. 411*

IV.

The Circuit Court of Appeals Reversed the District Court on Errors Patent in the Record Properly Assigned. Circuit Court of Appeals May, However, Reverse Any Case for Error Patent on the Record Though Not Properly Assigned.

By Paragraph 2 in his specification of errors (Page 5 of Petition for Writ of Certiorari and Brief in Support Thereof) counsel for the petitioner alleges that the Circuit Court of Appeals, although it might, on some grounds, reverse the judgment ap-

pealed from, could not do so by treating it as an order which merely quashed service of the citation.

The argument in regard to whether the decree of the district court in this cause (R. Pages 175-177) was one quashing service of process or was one quashing the process, is occasioned by the fact that the motion which was before the district court (R. Pages 173-175) is, with due deference, inartificially drawn. It is a mongrel pleading. It is neither fish nor fowl. If, as counsel now contends, the pleading is one under *Equity Rule Twenty-nine* to dismiss the supplemental petition, neither counsel for the petitioner, or the respondent in the lower court, nor the lower court, nor the Circuit Court of Appeals so regarded it.

In the first place the following language is used in the preamble of the pleading:

> "Does hereby, by his attorney, W. Calvin Wells, *appear specially* for the sole purpose of moving the court to quash the citation aforesaid, and to dismiss the petition aforesaid, and for no other purpose, on the ground that the court was and is without jurisdiction therein for the following reasons."

One cannot appear specially and file a motion to dismiss which is equivalent to a demurrer. Such an appearance is general. In the second place the grounds of the petition are such as leave the court and counsel in doubt as to what is actually attempted by the pleading. To illustrate: Grounds 1, 2, 14 and 16 are directed to the jurisdiction of the court over

the subject matter and the parties in the original cause; grounds 3, 4 and 12 are directed to the legality of the citation; grounds 5 and 6 are directed to the right of the court to proceed in a criminal contempt under *Section 268* of the *Judicial Code*. Grounds 7, 8, 9, 10 and 11 are directed to the sufficiency of the petition and citation; ground 13 to the effect that a final decree had been entered in the original cause; ground 15 to the privilege or exemption of Wm. E. Lamb from service of citation.

That the district court thought that this motion was a motion to quash the service is evidenced by the decree (R. Page 176) dismissing Wm. E. Lamb personally in the following language:

> "And the said Wm. E. Lamb is dismissed hence without day."

and by the further fact that the court quashed the citation as well as dismissed the petition.

On a motion to dismiss the district court would only have decreed a dismissal of the petition whereupon the complainants therein would have had the right to have amended, but instead of doing this the court quashed the citation, dismissed the petition and dismissed the petitioner personally, leaving the complainants without any right whatever to amend their pleading, as the petitioner was then out of court finally and for good. (We will take this point up again under the heading with regard to the finality of the decision of the district court.)

On Pages 10 and 11 of the Petition for Writ of Certiorari and Brief in Support Thereof, counsel for the petitioner alleges that there was no assignment

of error in the Circuit Court of Appeals covering the action of the district court in *quashing the citation* and dismissing the petition, but that the only error assigned was to the action of the district court in *quashing the service of process*, and that, therefore the Circuit Court of Appeals could not take up any error even if one was committed by the district court which was not assigned. That this is not the rule on appeal we cite the following cases:

Rule No. 11 of the Circuit Court of Appeals for all circuits.

Rule No. 25, United States Supreme Court.

Weems v. United States, 217 U. S. 349

Mohler v. Eby, 264 U. S. 32

"Whatever may be the rule in ordinary cases, we think that in a case where the court has rendered judgment upon the pleading, for either party, on assignment of error stating generally that the court erred in rendering the judgment upon the pleading, is sufficient as it directs the attention of this court directly to the point to be considered."

Klink v. Chicago, etc. R. R. Co. 219 Fed. 462

However, we think that the assignment of errors in the district court (R. Pages 179-180) though it may be inartificially drawn is certainly sufficient to call the attention of the district court as well as the Circuit Court of Appeals to the exact point in issue, and the exact error assigned, to-wit: That since the

petitioner had been made a party to the cause and he had duly answered and as the record showed had consented to a continuance of the cause, that he should not have been dismissed personally without day by the district court on a so-called "Motion to Quash," reference to which, and each of its grounds was then made. (R. Page 180). If counsel for the respondent was in doubt as to what to call the motion of petitioner and simply referred to it in the assignment of errors as "Motion to Quash the Service of Process, filed herein on the ___ day of___, 1930, for the causes set out in said motion to quash" the Circuit Court of Appeals is not barred from examining the error attempted to be alleged whether properly alleged or not.

The two cases of,

Fayerweather v. Ritch, 195 U. S. 276
Midland v. Ins. Co., 277 U. S. 346

present entirely different situations from the one here involved. In neither of those cases was the assignment of error in question, but it appeared that the record itself did not contain sufficient pleading or evidence upon which to base the theory of reversal as stated by the Circuit Court of Appeals.

V.

By His Answer in the District Court (R. Pages 147-177) Petitioner Submitted Himself to the Jurisdiction of that Court and Waived any Questions as to the Jurisdiction of that Court over His Person and Could Not Thereafter Set Up By Motion to Quash Process any Defense to the Jurisdiction.

Western Loan Co. v. Butte & Boston Mining Co., 210 U. S. 368

Mass. Bond Co. v. Concrete Steel Bridge Co., 37 Fed. (2) 695

Nelson v. Braughler, 35 Fed. (2) 779

Buckley v. Del. Co. 2 Fed. (2) 180

Sandusky Tp. v. DeLavaud, 251 Fed. 633

McLean Lumber Co. v. U. S. 237 Fed. 464

Panama Ry. v. Johnson, 264 U. S. 375

Grable v. Killetts, 280 Fed. 185

Norris, Inc. v. Wm. H. Reed & Co., 278 Fed. 19

Henderson v. Carbondale Coal Co. 140 U. S. 25

Christensen Engineering Co. Matter of, 194 U. S. 458

Rucksdale Sales Co. v. Starr Transmission Corporation, 13 Fed. (2) 478

Leach v. Burr, 188 U. S. 510

Seattle, Etc. R. R. Co. v. Union Trust Co. 79 Fed. 179.

VI.

Having Received, with full Knowledge of the Equities, a Part of the Subject Matter of the Litigation, Pendente Lite, the Petitioner, Attorney for the Defendant, was (a) Bound by the Result of the Litigation: and/or (b) Subject to Answer to the Court for His Actions Regardless of His Residence.

It was strenuously contended by counsel in the district court that the petitioner was not subject to the jurisdiction of the court either in this case, No. 432, or in the companion case, No. 433, on the

docket of this court (The Supreme Court of the United States) because of the fact that he was a non-resident attorney attending court in a foreign jurisdiction, and on this ground and this alone, both causes were dismissed by the district court on motions to quash the service of process in each case. This left the complainants in both cases without recourse unless they should go to Chicago, the then residence of petitioner (now, Milwaukee, Wisconsin, we understand) and there contest the right of the petitioner to take pendente lite approximately $90,000.00 of the funds in litigation. The records of the court would have to be transcribed, including thousands of pages of evidence and all the questions involved in the original case would probably have to be contested in a court unfamiliar with the proceedings.

It was contended by the complainants in the lower court,

(A) That the filing of the creditors bill in cause No. 129 created an equitable levy on the entire estate of Mrs. Florence T. Holland, and the funds taken by petitioner with full knowledge thereof, were at the time of taking in *gremio legis.*

Section 328, Hemingway's Code of Mississippi, 1927

Lumber Co. v. Lumber Co. 85 Miss. 54

Yates v. Council, 137 Miss. 381

Miller v. Sherry, 69 U. S. 249

Evans v. Welch, 63 Ala. 250

Dillard & Coffin v. Smith, 59 S. W. 1010

27 C. J. Section 860

Friedman v. Earle, 110 U. S. 710

Metcalf Bros. v. Barker, 187 U. S. 165

U. S. v. Pierce Oil Co. 254 U. S. 397

Marsell v. Bank, 91 U. S. 357

Ex Parte Boyd, 105 U. S. 647

(B) That the doctrine of lis pendens applied to petitioner as a taker pendente lite with notice of the equities.

46 C. J. 542-43- 44-45

Hazelhurst v. The Lulu, 10 Wall. 192

Lytle v. Town of Lansing, 147 U. S. 59

Scotland v. Hill, 112 U. S. 183

Freeman on Judgments, 5th Ed. Vol. I, Sections 519-526, inclusive

Stewart v. Lansing, 104 U. S. 505

Orleans v. Platt, 99 U. S. 676

(C) That such taker pendente lite, with knowledge of the equities is bound by the suit; and as to land, writ of possession may be issued against him though he is not a party to the suit.

Mullen v. Moline Iron Co. 131 U. S. 371

Union Tr. Co. v. So. Etc. Imp. Co. 130 U. S. 565

Tilton vs. Cofield, 93 U. S. 163

Warren v. Marcy, 97 U. S. 96

Terrel v. Allison, 88 U. S. (21 Wall.) 289

Walden v. Bodley, 50 U. S. (9 How.) 34

(D) That since the property taken pendente lite by the petitioner was in gremio legis in cause No. 129 the same court should decide the question concerning its transfer pendente lite, and not the court of the residence of the petitioner.

Illinois Steel Co. v. Putnam, 68 Fed. 517

Adams v. Merc. Tr. Co. 66 Fed. 620

Long v. Choctaw, Okla. Co. 160 Fed. 365

Re: Ins. Corp. v. Mutual Ins. Co. (C. C. A. 5) 45 Fed. (2) 593

Ward v. Foulkrod, 264 Fed. 630

Sharp v. Bonham, 213 Fed. 667

Kline v. Burke Constr. Co. 260 U. S. 226

Harkin v. Brundage, 276 U. S. 36

Palmer v. Texas, 212 U. S. 118

Heidreter v. Elizabeth Oil Cloth Co. 112 U. S. 294

Chicot Co. v. Sherwood, 148 U. S. 529

Julian v. Central Tr. Co. 193 U. S. 93

Wabash R. R. Co. v. Adelbert College, 208 U. S. 38

Metcalf v. Barker, 187 U. S. 165

(E) The petitioner having received pendente lite, with full knowledge of the equities, part of

the property then in the actual or constructive possession of the court, he, then and there for all practical purposes became bound by the suit and it was proper to bring him in as a purchaser pendente lite for the purpose of canceling his claim of title to any of the property, and making him return into court any part of the subject matter of the litigation.

Tilton v. Cofield, 93 U. S. 163

Cabell v. Ellis, 110 U. S. 389

Jefferson v. Driver, 117 U. S. 272

Root v. Woolworth, 150 U. S. 401

Story's Equity Pleading, 10th Ed. Sec. 342-343

VII.

The District Court Had Jurisdiction with Reference to the Parties as Well as the Subject Matter in Litigation and Should Have Retained That Jurisdiction and Not Referred the Parties to the Jurisdiction of the Residence of the Attorney of the Defendant Who Had Received a Part of the Subject Matter in Litigation Pendente Lite.

Empire Trust Co. v. Brooks, 232 Fed. 641

Harkin v. Brundage, 276 U. S. 36

Ward v. Foulkrod, 264 Fed. 627

Kline v. Burke Const. Co. 260 U. S. 224

Palmer v. Tevas, 212 U. S. 118

Farmers Loan Co. v. Lake St., etc., 177 U. S. 59

See also cases cited under (D) *page 38 hereof.*

VIII.

REPLY TO PETITIONER'S BRIEF ON THE MERITS

The foregoing parts of this brief were written without the advantage of having before us petitioner's brief on the merits. That brief arrived on this date, January 4, 1932. Since in the foregoing we have covered practically all of the citations and authorities quoted by counsel for petitioner in the brief on the merits, we shall, since our time is limited to file our reply, only take this occasion to reply to the arguments and reasonings advanced by them in said brief.

We call the court's attention that under Division II "Statement of the Case" Pages 2 and 3 of the brief counsel outline the figures of the amount in controversy in the main cause, attempting to make the point that only a small number of judgment creditors had intervened when petitioner got the money in controversy. He forgets that the United States Government had intervened for an amount of approximately $681,163.40 income taxes which intervention is not set forth in full in the record, but is referred to in petitioner's answer in No. 129 (R. Page 154) where it is shown that the Government on or about December 17, 1928, intervened for $681,163.40. This intervention was pending throughout the entire case until final decree at which time $7,000,000.00 of other judgments were entered. The court below, of course, had the whole record of the case before it on this supplemental petition in cause No. 129.

At page 5 of the brief on the merits counsel suggests that the decree in the main cause No. 129 was

a consent decree, inferring thereby that (a) the petitioner would not be bound thereby; (b) that since the main cause was settled by consent a supplementary proceeding would take the same course and/or (c) that the Circuit Court of Appeals had no jurisdiction of the appeal because, forsooth, there was no appeal from the consent decree. We have answered this contention already under heading III Especially page 30 of this brief but take this occasion to say again that whether by consent or not the decree entered in cause Number 129 has nothing to do with this supplementary proceeding because that decree especially reserved decision on the supplemental decree, at petitioner's request. We cannot understand why counsel continually speak about a consent decree when they ought to know that this cause on the merits in No. 129 was decided by the court after full trial and the hearing of evidence, and an opinion delivered by the court. A decree was then drawn in accordance with the opinion of the court and only consented to as to form, etc., and while Mrs. Holland was given certain exempt property such as her homestead, etc., as shown in the decree, that could in no way affect the petitioner.

The supplementary petition was reserved especially in the decree for hearing and at the end of the decree it appears (R. Pages 146-147) that the hearing on the supplementary petition was set especially for hearing on June 9, 1930. It is also provided in the decree that

"Wm. E. Lamb, or Butler, Lamb, Foster & Pope not to be prejudiced hereby."

It is not a question now as to whether the petitioner is bound by the decree since it is provided therein that he shall not be prejudiced thereby. The simple question is presented to the court in this case as to whether or not sufficient evidence was before the court in the supplementary proceeding to show a question before the district court on the motion to quash the process as to petitioner's liability for a part of the subject matter of the litigation and whether or not that cause should have been quashed and Lamb dismissed without day, or whether it should have been retained by the lower court for trial on the merits. Counsel refer to only one case in regard to consent decree, to-wit:

Hodgson v. Vroom, 266 Fed. 267

which is not in any way in point in the present case and was a case wherein res adjudicata was pleaded and the court held that on account of the decree being a consent decree same was not res adjudicata.

The petitioner well knew that he would have been bound in every respect by the decree had he not insisted, as a courtesy to him, that there should be entered in the decree a clause that he was not to be prejudiced thereby (though he was a party at the time) and that the matters in which he was connected were not consented to and were set forward to be heard on the 9th of June, 1930.

Counsel insist on calling the answer of petitioner (R. Pages 146-147) special appearance. We refer the court to heading V., page 34 in this brief where the cases are cited showing that such an appearance though it may be called special is an appearance generally, and see the answer itself. (R. Page 147.)

At Paragraph 2, Page 20, counsel for petitioner insist that unless served with subpoena, even though Lamb answered in full, he is still not a party to the cause. Counsel cite:

In Re: Tacoma Freight Inc., 5 Fed. (2) 752

Upon a reading of this case it appears that it was a default for answer not filed. No subpoena was issued in a bankrupt matter and the bankrupt failed to answer but appeared in court voluntarily. The conditions in that case are not similar to the case at bar.

We notice counsel in quoting from the order of the court quashing the process in this case at Page 22 in his brief, and in quoting from the answer of Lamb at the same page of the brief has failed to quote material portions of both. This court will not be misled by partial quotations. The order of the court quashing the process (R. Pages 175-177) shows that the matter came on to be heard.

"Upon the petition of plaintiffs for the citation of Wm. E. Lamb for contempt, *and* for an order to turn over money paid to said Lamb by

the defendant, *and* upon the motion to quash the process *and* dismiss the petition for the citation of Wm. E. Lamb for contempt, *and* for an order to turn over money paid Lamb by the defendant." (R. Page 175.)

The court in said decree (R. Page 176) not only quashed the process and dismissed the petition for citation but also dismissed the supplemental proceedings "for an order to turn over money paid him by the defendant."

The respondents here complain, of course, that the court considered the petition in any manner as a criminal contempt proceeding and contend that counsel for the defendant have misconstrued the proceeding. The truth about it is the whole hearing on the motion to quash went off on the proposition of the privilege of petitioner, a non-resident attending court in a foreign jurisdiction, not being subject to process in this or the companion case, cause No. 433. All these other questions came up as an afterthought in the Circuit Court of Appeals. That counsel for the plaintiffs below (respondents here) considered this to be so is to be seen in their objections to the inclusion in the record of certain parts thereof, (R. Page 192) where it was stated that the only question presented to the judge of the lower court was the privilege of the petitioner.

Counsel call the pleadings of the plaintiffs in the cause "hybrid." We should like to find a name a little stronger than hybrid for the so-called "Motion to Quash the Process," the many grounds of which

have created the interminable arguments advanced by counsel.

Under heading III, Page 24 of their brief on the merits counsel argue the facts as to whether or not petitioner will finally be held liable for the funds, and whether or not the funds were trust funds, or in the hands of the court. We have covered these arguments under headings VI (a), (b), (c), (d) and (e) of this brief already but insist that these matters are for the district court on the merits when this case finally arrives there.

The discussions on Pages 27 and 28 in their brief on the merits by counsel for the petitioner with regard to the difficulties that will face the district court if this case is sent back seem to us a prayer here to affirm the district court because of the dilemma which seems to face the petitioner if any other course were pursued. None of the questions suggested by counsel in that statement will arise if we are correct in the assumption that by his answer (R. Page 147) the petitioner acknowledged service and appeared in court and is now a party to the supplemental proceeding in cause No. 129 When one appears in court officially under his own oath and by counsel no service of subpoena is needed. He then becomes a party to the cause and under the jurisdiction of the court.

The fact that Schmitt, Receiver, has filed an ancillary bill (No. 162, here No. 433) regarding the

same subject matter and parties is not a question before the court. Upon proper plea in abatement in either of the causes below the court in its discretion may abate one or the other, or it may under the equity rules consolidate the two cases and hear them together. There is no occasion for counsel for the respondents to state now the reasons for the filing of the additional and ancillary proceeding in cause No. 162. The filing of that bill was out of precaution and at the instance of the receiver. The petitioner need give himself no uneasiness as to how the district court will proceed since the law in the matter is, in our opinion evident.

We desire, in addition to those authorities under heading VI (b) hereof, to add, what we think is an authority in point on the liability of petitioner, namely:

Opinion No. 29 of the Committee on Professional Ethics and Grievances Concerning Matters of Professional Conduct of the American Bar Association made to the 54th Annual Meeting at Atlantic City, New Jersey, Thursday, Friday and Saturday, September 17, 18, 19, 1931.

The question is there submitted to the Committee on Professional Ethics and Grievances as follows:

> "A, an attorney, was employed by W. to bring suit against X to cancel and rescind a real estate transaction in which W had purchased a hotel property from X. Recission was sought on

the ground that X had induced the transaction by means of false and fraudulent representations. As part of the consideration for the hotel property, W had deeded to X certain land in Canada. If a decree of cancellation and recission were entered, it would require X to reconvey the Canadian land to W. After trial, the court denied the recission, but refused to dismiss the action on the ground that plaintiff, W, was entitled to recover damages. W then filed a motion for a new trial, which was granted.

Shortly after the trial, and before the motion for a new trial had been granted W heard that X was trying to sell the Canadian land, and, upon inquiry, discovered that X had deeded the land to his attorney, B, who had represented him in the trial. B had full knowledge of the fraud claimed but asserts that he took the deed to insure the payment of his fees.

May B properly attempt to convey the land to an innocent purchaser for value so as to get his fee in cash?

In the event that the court finds that the plaintiff is entitled to relief and enters a decree of recission requiring X to reconvey the Canadian land to W, can B claim the land, or a lien thereon, on account of fees due him from X?"

The Committee's opinion was stated by Mr. EVANS, Messrs. Howe, Harris, Pace and Gallert concurring.

'It was proper for B to accept a conveyance of the land in question for the purpose of se-

curing his fees and disbursements, only if he accepted it to be held subject and junior, in all respects to the rights of W, as finally adjudicated by the court. Therefore, it would be improper for B, unless the litigation be finally determined in favor of X, to convey the land to an innocent purchaser for value, since the right to the property is before the court and B, as an officer of the court, cannot properly do anything that may interfere with the execution of the decree of the court.

'As any and all claims of B in or to the land in question, even if conveyed to him and standing in his name, are subject and junior to the rights of W, as adjudicated by the court, B cannot properly claim the land, or any lien thereon if the court orders that it be reconveyed to W.' "

It will be noted that in the above matter the court did not have actual possession of the property, but it was well known that in a final decree the court might have to take possession of the property if a decree of recission was rendered.

CONCLUSION

We respectfully submit that the decree of the Circuit Court of Appeals was correct, and that it should be affirmed.

Respectfully submitted,

GERALD FITZGERALD,
Counsel for Respondent

GARNER W. GREEN,
SAM C. COOK.
of Counsel.